No. 91-1016

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

BIG HORN COAL COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May contractual obligations arise between labor and management, enforceable under Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), arising from the course of dealings and conduct of the parties in the absence of a formal collective bargaining agreement?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below were the International Union, United Mine Workers of America as Plaintiff-Appellee, and Big Horn Coal Company, a Wyoming corporation, as Defendant-Appellant.

Big Horn Coal Company is a subsidiary of Kiewit Mining Group, Inc., which is, in turn, a subsidiary of Peter Kiewit Sons', Inc.

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PETITION FOR A WRIT OF CERTIORARI

COMES NOW the International Union, United Mine Workers of America (hereinafter referred to as "Union" or "UMWA") and petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit herein.

OPINIONS BELOW

The Opinion of the Court of Appeals below (A. 1a).[1] is reported at 916 F.2d 1499. The Order and Opinion of the District Court below (A. 7a) is reported at 715 F. Supp. 1060.

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[1] References are to the Appendix ("A.") to this petition and page number ("—a.") thereof.

JURISDICTION

The decision of the Court of Appeals (A. 1a) was entered on October 15, 1990, and the UMWA's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court on September 13, 1991 (A. 14a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The meaning of, and Congressional intent underlying, Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), are involved in the instant petition:

> "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

29 U.S.C. § 185(a).

STATEMENT OF THE CASE

Since the 1940s the production and maintenance employees of Big Horn Coal Company (hereinafter referred to as "Big Horn" or "Company") have been represented by the UMWA through its Local Union 2055. The Company and the UMWA were party to a series of contracts establishing terms and conditions of employment, including terms prohibiting discharge or discipline of employees without cause, and establishing a grievance and arbitration procedure covering all disputes between the Union and Company, whether as to matters within the contract, beyond the scope of the contract, or of any nature whatever. Disputes not settled through the grievance pro-

cedure could be submitted by either party to binding arbitration.

In March, 1987 the 1984-87 contract was extended by mutual agreement to June 1, 1987 while the parties continued negotiations toward a successor contract. On July 1, 1987 the Company declared negotiations to be at impasse and implemented new terms and conditions of employment at the mine. The terms and conditions implemented by the Company were what had been its last contract offer: a series of proposed revisions to parts of the 1984 contract, with all provisions not mentioned among the proposed revisions to continue in effect. Among the terms of the 1984 contract implemented unrevised by the Company was the grievance and arbitration provision.

The employees worked through the course of negotiations and continued to work under the Company's implemented terms and conditions until they commenced a strike some months later. Following the strike the Company refused to reinstate eighteen of the former strikers for alleged strike misconduct. Each of the eighteen filed a grievance protesting his discharge, which was processed by the Company and Union through the steps of the grievance and arbitration procedure. Following the Company's refusal to proceed with arbitration the Union filed an action pursuant to Section 301 of the Labor-Management Relations Act seeking to compel the Company to arbitrate.

The Union argued to the District Court, *inter alia*, that a contractual obligation to arbitrate arose from the Company's implementation of terms and conditions of employment which included an arbitration provision. On July 6, 1989 the District of Wyoming rendered its decision in favor of the Union (A. 7a). Noting that "an employer and a union may adopt a collective bargaining agreement without a signed contract by manifesting their intent to abide by and be bound by its terms" (A. 11a), the District Court found that:

> "(the) company's letter and the employees' continuation to work after the offer was made objectively manifest the parties' mutual assent."

(A. 12a).

Following the Company's appeal, the Tenth Circuit reversed (A. 1a). In so doing the Tenth Circuit relied on its earlier decision in *United Food and Commercial Workers Intern. Union v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990), in which it had found no contractual relationship where the employees continued to work under an employer's last contract offer implemented following their union's express rejection of the proposal. There being no action on the part of either the union or employer in *Gold Star Sausage* to "constitute acceptance necessary to form a contract . . . the court *was without jurisdiction to proceed under Section 301* . . ." (A. 5a, citing 897 F.2d at 1024, 1026) (emph. supp.). In conclusion the Tenth Circuit herein stated that:

> "[w]e do not agree the contractual relationship was created on July 1, 1987 by virtue of the employer's implementation of its last offer or by virtue of any perceived acceptance of that offer evidenced by employee conduct. We determine that this court is *without jurisdiction* to consider whether the disputes in this case should be referred to arbitration and hereby REVERSE the decision of the district court"

(A. 5a-6a) (emph. supp.).

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NEEDED TO ESTABLISH THE INCLUSIVE REACH OF SECTION 301 CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT.

Some federal courts are adopting the rationale expressed by the Tenth Circuit in this case and in *Gold Star Sausage* in order to truncate the reach of Section 301. The legislative history of Section 301 and this Court's decisions as to its scope establish Section 301 as the inclusive vehicle for resolving disputes between labor and management, and enforcing contractual obligations. It is inconsistent with that broad scope to restrict Section 301 to cases presenting formal collective bargaining agreements. If the rationale of the Tenth Circuit prevails, Section 301 will only be available in those instances where a party can present a formal contract to the court and prevail on the merits; the federal courts will not be available to hear disputes between labor and management in the absence of a winning claim on a written contract. This will result in contractual disputes being left unresolved on procedural grounds.

Section 301(a) confers broad jurisdiction on the federal courts to hear and decide "suits for violations of contracts between" unions and employers. While a narrow interpretation of the statute might lead to the result reached by the Tenth Circuit herein and in *Gold Star Sausage*, both the legislative history of Section 301 and a series of decisions of this Court compel a different conclusion. The only conclusion consistent with that legislative history and this Court's prior decisions is that Section 301 not only grants jurisdiction over cases which involve alleged breaches of labor contracts the validity of which are not in dispute, but that it tlso grants jurisdiction over cases which involve the threshold question of the existence or validity of such contracts.

In recognition of the Congressional intent underlying the statute this Court has interpreted Section 301 as

more than merely procedural. Congress plainly meant for Section 301 to expand the availability of forms available to parties seeking to enforce the obligations of contractual relationships between unions and employers. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 508 (1962). Passage of Section 301 "represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process." *Id.* at 509. Proposals to make violations of contracts an unfair labor practice were rejected, as Congress intended that labor contracts should be enforceable only in the courts. "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law . . . ." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947); *see also Textile Workers v. Lincoln Mills*, 353 U.S. 448, 452 (1957). To accomplish the ultimate goal of facilitating the enforcement of labor contracts, Congress made it clear the courts are to have a broad scope of authority under Section 301 to hear and decide actions involving such contracts. Section 301

> "contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employer to secure declarations from the Court of legal rights under the contracts."

93 Cong. Rec. 3656 (1947) (statement by Rep. Barden), quoted in *Lincoln Mills*, 353 U.S. at 456.

Labor contracts are not ordinary contracts, and in the field of labor relations the technical rules of contract law do not determine the existence of a contract. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964). On the contrary, Section 301 "authorizes federal courts to fashion a body of federal law for the enforcement of" labor contracts based upon "the policy of our national

labor laws." *Lincoln Mills*, 353 U.S. at 451; 456, and this Court has acknowledged the role of "judicial inventiveness" in the application of Section 301. *Id.* at 457.

Section 301 is the embodiment of national labor policy, the instrument for the enforcement of obligations of employers and unions and the peaceful resolution of industrial disputes. The broad conception of Section 301 which *Lincoln Mills* represents is the only correct one, and this Court has consistently adhered to it. *See*, e.g., *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) ("the dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount . . . [c]omprehensiveness is inherent in the process . . ."); *United Ass'n. of Journeymen v. Local 334, Plumbers and Pipefitters*, 452 U.S. 615, 628 (1981) ("[i]t is far too late in the day to deny Congress intended the federal courts to enjoy wide-ranging authority to enforce labor contracts under § 301."); *Groves v. Ring Screw Works, Ferndale Fastener Div.*, 111 S. Ct. 498, 502 (1990) ("under § 301, as in other areas of the law, there is a strong presumption that favors access to a neutral forum for the peaceful resolution of disputes"). In so doing, this Court has admonished that Section 301 "is not to be given a narrow reading." *Smith v. Evening News Ass'n.*, 371 U.S. 195, 199 (1962).

The courts can only interpret Section 301 to be inclusive rather than exclusionary, consistent with its legislative history. That interpretation leads directly to the conclusion that the courts must not exclude disputes which raise the preliminary question of the existence or validity of collective bargaining obligations as a threshold to whether such obligations had been breached. The decisions of the Tenth Circuit herein, and in *Gold Star Sausage*, are inconsistent with that broad interpretation, and serve only to hamper the administration of labor contracts which Section 301 is intended to serve. This substantial question of federal labor jurisprudence must

be reviewed in order to establish the inclusive reach of Section 301, consistent with its legislative history and decisions of this Court.

II. REVIEW IS NEEDED TO RESOLVE THE CONFLICT BETWEEN CIRCUITS, AND WITHIN THEM, AS TO THE REACH OF SECTION 301.

In reaching the result it did in *Gold Star Sausage* the Tenth Circuit rejected the union's argument that the employer therein "assumed the obligation to arbitrate when it implemented its (last contract) offer," opining that such an argument "ignores the fact that Section 301(a) . . . gives the court jurisdiction over suits for violation of *contracts*" only. 897 F.2d at 1026 (emph. in orig.). Ignoring the merits of any argument that implementation of a contract offer may lead to obligations enforceable under Section 301, the Tenth Circuit simply held that "[b]ecause the Company's last offer is not a contract . . . this Court is without jurisdiction to consider whether the disputes of these cases shall be referred to arbitration", on the strength of its pronouncement that "[i]t is well established that the existence of a contract is an essential prerequisite to suit under Section 301(a)." [2] *Ibid.* (emph. supp.). As noted *supra*, the Tenth Circuit's decision reversing the District Court herein tracks the language of *Gold Star Sausage* almost verbatim: "we determine that this Court is without jurisdiction to consider whether the disputes in this case should be referred to arbitration" (A. 6a.).

The various Circuit Courts are sharply divided between one another, and in some instances among themselves, as

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[2] The confusion among the Circuit Courts is reflected by the fact that in reaching its conclusion the Tenth Circuit relied on *Intern. Bhd. of Elec. Workers v. Sign-Craft, Inc.*, 851 F.2d 910 (7th Cir. 1988). At the time of the Tenth Circuit's decision in *Gold Star Sausage*, however, the *Sign-Craft* decision reported at 851 F.2d 910—and with it its interpretation of Section 301 jurisdiction—had been reversed by the Seventh Circuit sitting *en banc*. *See infra*.

to whether federal courts should refrain from exercising jurisdiction under Section 301(a) as in *Gold Star Sausage* and herein. The view of the panel herein and in *Gold Star Sausage* is consistent with the view of Section 301 jurisdiction held by the First and Fourth Circuits, as well as one panel of the Sixth. *See Hernandez v. Nat'l Packing Co.*, 455 F.2d 1252, 1253 (1st Cir. 1972) (no jurisdiction under Section 301 to challenge the validity of a contract); *A.T. Massey Coal Co. Inc. v. Intern. Union, UMWA*, 799 F.2d 142, 146 (4th Cir. 1986), *cert. denied*, 481 U.S. 1033 (1987) (jurisdiction does not exist under Section 301 to determine whether parties are not bound by contracts; breach of existing contract must be shown); *Heussner v. Nat'l. Gypsum Co.*, 887 F.2d 672, 676 (6th Cir. 1990) (court reluctant to expand interpretation of Section 301 to give district courts jurisdiction over question of the validity of contract; Section 301 to be strictly construed). These courts have essentially adhered to the plain language of the statute, going no further than to determine whether a case involves breach of a contract the existence or validity of which is not disputed.

True to the legislative history of Section 301 and its interpretation of Section 301 jurisdiction, holding that that Section 301 jurisdiction may be invoked without reference to an undisputed formal contract; courts may rely on it to hear and decide questions as to the existence or validity of contracts. These circuits are the Second, Third, Fifth, Seventh, Ninth and Eleventh, and one panel of the Sixth.[3] *See Kozera v. Westchester-Fairfield Elec. Contractors*, 909 F.2d 48, 52 (2nd Cir. 1990), *cert. denied*, 111 S. Ct. 956 (1991) (ancillary to the determination of the

[3] In *Central Missouri Paving Co. v. United Mine Workers*, 749 F. Supp. 973 (E.D. Mo. 1990), the Eastern District of Missouri stated that "although the Eighth Circuit has not resolved the question of the existence" of Section 301 jurisdiction over cases such as those presented herein, it was joining those courts which have embraced the broader interpretation. *Id.* at 979.

merits of Section 301 action is determination of existence or validity of purported contract); *Mack Trucks, Inc. v. Intern. Union, UAW*, 856 F.2d 579, 586-90 (3rd Cir. 1988), *cert. denied*, 489 U.S. 1054 (1989) (Section 301 confers jurisdiction on courts to decide existence of collective bargaining agreement); *Steelworkers v. Rome Industries*, 437 F.2d 881, 882 (5th Cir. 1970) (courts have jurisdiction to determine validity in absence of alleged breach); *Intern. Bh'd. of Elec. Workers, Local 481 v. Sign-Craft, Inc.*, 864 F.2d 499, 501-02 (7th Cir. 1989) (Supreme Court supports view that Section 301 to be interpreted broadly; disputes over validity of contracts within its jurisdiction); *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321, 1326 (9th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989) (Section 301 applies to suits impugning the existence or the validity of a labor agreement); *Bd. of Trustees v. Universal Enterprises*, 751 F.2d 1177, 1184 (11th Cir. 1985) (courts have jurisdiction under Section 301 to determine whether a contract in fact exists); *Local 1603 v. Transue & Williams Corp.*, 879 F.2d 1388, 1393 (6th Cir. 1989) (Section 301 jurisdiction exists in absence of formal contract; court could determine if labor contract exists by conduct of parties).

The Tenth Circuit's narrow interpretation of Section 301 herein and in *Gold Star Sausage* conflicts, moreover, with an earlier decision of another Tenth Circuit panel. In *McNally Pittsburg, Inc. v. Intern. Ironworkers*, 812 F.2d 615 (10th Cir. 1987), the Tenth Circuit explicitly embraced the decisions of those circuits adopting a broad interpretation of Section 301 jurisdiction, holding that courts may exercise that jurisdiction in the absence of an alleged breach of an existing contract. *Id.* at 617-19. Other courts have since looked to the Tenth Circuit's authority and adopted the reasoning of *McNally Pittsburg* in reaching the same conclusion. *See Kozera*, 909 F.2d at 52; *Sign-Craft, Inc.*, 864 F.2d at 502; *Mack Trucks*, 8567 F.2d at 589; *Central Missouri Paving*, 749 F. Supp. at 979.

The Tenth Circuit's decision herein, meanwhile, is the product of confusion engendered by this unsettled conflict. In *McNally Pittsburg* the Tenth Circuit explicitly *rejected* the decisions of those circuits which adhere to narrow interpretations, including that of the Seventh Circuit in *NDK Corp. v. Local 1550, UFCW*, 709 F.2d 491 (7th Cir. 1983). As noted at footnote 2 *supra*, the *Gold Star Sausage* Tenth Circuit panel (and, by relying on *Gold Star Sausage*, the Tenth Circuit panel herein) explicitly *adopted* the narrow Seventh Circuit view as reflected in a decision after *NDK*. In so doing, it completely overlooked the fact that the Seventh Circuit had recently reversed itself and adopted the holding of *McNally Pittsburg*. *Sign-Craft, Inc., supra*, 864 F.2d at 502.

Review should be granted to resolve the conflict among the courts and replace it with a uniformity of authority as to this substantial question.

CONCLUSION

WHEREFORE, based on the above and foregoing, Petitioner International Union, United Mine Workers of America, respectfully submits that this case presents the Court with a substantial question of federal law about which the lower courts are in conflict, and that its petition should therefore be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

[U.S. COURT OF APPEALS OPINION]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 89-8067

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA,
Plaintiff-Appellee,

BIG HORN COAL COMPANY, a Wyoming corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. C-88-0254-J)

[Filed Oct. 15, 1990]

Earl V. Brown, Jr., of United Mineworkers of America, Washington, D.C. (John L. Quinn and Robert M. Weaver of Longshore, Nakamura & Quinn, Birmingham, Alabama, on the brief) for Plaintiff-Appellee.

Sandra R. Goldman (Jeffrey T. Johnson with her on the briefs) of Holland & Hart, Denver, Colorado, for Defendant-Appellant.

Before HOLLOWAY, Chief Judge, McWILLIAMS, Circuit Judge, and BRATTON, Senior District Judge.*

PER CURIAM.

This appeal arises from an order of the district court granting summary judgment for the United Mine Workers of America (the "Union") against Big Horn Coal Company (the "Company") and denying the Company's cross-motion for summary judgment. The disputed issue is whether the Company has an obligation to submit to arbitration certain grievances which arose after the expiration date of the parties' collective bargaining agreement. The lower court held as a matter of law that such an obligation exists in this case. We find no contract between the parties upon which to base jurisdiction under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a). Accordingly, we reverse.

In the spring of 1987, Union and Company officials began negotiation efforts to reach agreement on a new labor-management contract. These efforts extended past the June 1, 1987 expiration date of the parties' collective bargaining agreement but no new agreement was reached. On July 1, 1987, after negotiations reached an impasse, the Company implemented its "last and final offer," an offer which, from all appearances, included the grievance and arbitration provision of the expired contract.[1]

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* The Honorable Howard C. Bratton, Senior United States District Judge for the District of New Mexico, sitting by designation.

[1] On June 4, 1987, the Company sent a letter to the Union outlining the terms of the Company's last contract offer. This letter delineated the contract sections which would be changed from the prior agreement, and further stated, "[A]ll other provisions of the 1984 agreement not hereinbefore mentioned remain in effect under our last offer." No change in the grievance and arbitration provision had been discussed.

The employees continued thereafter to work until October 5, 1987, when Local Union 2055, comprised of mine worker employees at Big Horn Coal Company's Sheridan, Wyoming mine, commenced a strike. The strike continued until on or about June 27, 1988, at which time the Union, on behalf of Local Union 2055 members, notified the Company of the employees' unconditional offer to return to work.

The Company, however, refused to reinstate eighteen of the striking employees, alleging that they had been engaged in serious strike-related misconduct. The Union filed grievances on behalf of each employee. The Union and the Company processed these grievances through the steps of the grievance procedure without resolution. At the conclusion of the last meeting the Union demanded arbitration. The Company refused to submit to arbitration on the grounds that the grievances were not arbitrable.

The Union brought this action pursuant to Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, seeking an order to compel the Company to arbitrate the grievances of the employees denied reinstatement. The Union argued that the Company's unilateral implementation of its last offer extended the Company's contractual obligation to arbitrate.

The district court, in granting the Union's summary judgment motion and denying the Company's motion, held that the parties intended to abide and be bound by the unchanged terms of the expired collective bargaining agreement. R. Vol. I, Tab 21, p. 7. The court found that the Company's extension of the final offer and the employees' continuation to work after the offer was implemented constituted objective manifestations of the parties' mutual assent to contract. *Id.* Upon review of the district court's decision, we utilize the same standard employed by the court below and examine the conclusions

reached *de novo*. Fed. R. Civ. P. 56(c); *Ewing v. Amoco Oil Co.*, 823 F.2d 1432, 1437 (10th Cir. 1987).

In *United Food and Commercial Workers International Union v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990), we rejected the position taken by the labor union therein that federal courts should enforce an arbitration provision included within the terms of a unilaterally-implemented last offer. *Id.* at 1026-27. Employer implementation of a last and final offer is, by itself, insufficient to invoke jurisdiction absent some manifestation of acceptance of the offer sufficient to create a contract. *Id.* at 1026. As we noted in *Gold Star*, jurisdiction under Section 301(a) of the Labor-Management Relations Act arises when redress is sought for "violations of *contracts* between an employer and a labor organization.'" *Id.*, citing 29 U.S.C. § 185(a) (emphasis supplied in *Gold Star*). Thus, simply spotlighting management's exercise of its statutory right to implement its last and final offer does not establish the contractual basis necessary for jurisdiction. *Milwaukee Typographical Union No. 23 v. Madison Newspapers, Inc.*, 444 F. Supp. 1223, 1227 (W.D. Wis. 1978), *aff'd mem.*, 622 F.2d 590 (7th Cir. 1980).

The contract between the parties required for jurisdiction need not be a written, signed collective bargaining agreement, but may exist as any informal agreement between the parties significant to the maintenance of labor peace between them. *Retail Clerks Int'l Ass'n, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28 (1962). It suffices that the parties' intent to abide by the agreed-upon provisions of any such informal agreement is in some manner manifest. *Bobbie Brooks, Inc. v. Int'l Ladies Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987); *see also United Paperworkers Int'l Union v. Wells Badger Industries, Inc.*, 835 F.2d 701, 704 (7th Cir. 1987).

In *Gold Star*, we noted that in one case an employer's implementation of its last offer constituted an invitation to enter into an interim unilateral contract, accepted by the employees' continued performance. 897 F.2d at 1026, *citing Taft Broadcasting Co. v. NLRB*, 441 F.2d 1382 (8th Cir. 1971). Yet, in *Gold Star* we found no unilateral contract. The Union therein had expressly rejected the employer's last offer. Thus, the fact that the *Gold Star* employees continued to work after the rejection did not constitute the acceptance necessary to form a contract, and the *Gold Star* court was without jurisdiction to proceed under Section 301 of the Labor-Management Relations Act. 897 F.2d at 1024, 1026.

The facts of the present case likewise suggest implicit rejection of the employer's offer. The lower court's determination that a "legal relationship [was] created between the parties on July 1, 1987," *see* R. Vol. Tab 21, p. 8, the date the last offer was implemented, is unsupported. Employee conduct after July 1, 1987, did not evince an acceptance of the Company's last offer. To the contrary, the commencement of a seven-month strike on October 5, 1987, during which time the alleged misconduct occurred, shows continued dissatisfaction with and rejection of the employer's offer.[2] *See Int'l Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers—Local 1603 v. Transue & Williams Corp.*, 879 F.2d 1388, 1393-94 (6th Cir. 1989) (labor contract found to exist because parties refused to marshal economic weapons such as strikes or lockouts and adhered to the arbitration provisions of their prior agreement during period without formal collective bargaining agreement).

Accordingly, we do not agree that a contractual relationship was created on July 1, 1987, either by virtue of

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[2] As of the date the briefs were filed in this matter the Union and Company still had not agreed on a new collective bargaining agreement.

the employer's implementation of its last offer or by virtue of any perceived acceptance of that offer evidenced by employee conduct. We determine that this Court is without jurisdiction to consider whether the disputes in this case should be referred to arbitration and, hereby, REVERSE the decision of the district court.

[DISTRICT COURT OPINION]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. C88-0254J

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA,
Plaintiff,

v.

BIG HORN COAL COMPANY, a Wyoming corporation,
Defendant.

ORDER RULING ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT

[Filed Jul. 6, 1989]

The plaintiff, United Mine Workers of America, brings this action seeking an order to compel Big Horn Coal Company to arbitrate certain grievances the union filed on behalf of 18 workers the company discharged after the collective bargaining agreement between these parties had expired. The company, which discharged these workers for alleged strike misconduct, refused to arbitrate the grievances because the dismissals occurred after the expiration of the parties' collective bargaining agreement. The matter is now before the court on the parties' cross-motions for summary judgment.

The union and the company were parties to a collective bargaining agreement that expired on June 1, 1987. After they attempted to negotiate a new agreement, the

company, on July 1, 1987, unilaterally implemented working terms and conditions contained in its last offer to the union, which stated that "[a]s previously indicated all other provisions of the 1984 labor agreement not hereinbefore mentioned remain in effect under our offer." The company's employees continued working under this offer until October 5, 1987, when the local union commenced an economic strike at the company's Sheridan, Wyoming, mine. The strike continued until June 27, 1988, when the employees unconditionally agreed to return to work. The company, however, refused to reinstate 18 of its former striking employees for allegedly engaging in serious strike misconduct.

Pursuant to the arbitration provision of the expired collective bargaining agreement, the union immediately filed grievances on behalf of the 18 discharged employees. After the parties processed the grievances without resolution, the union demanded arbitration under the expired agreement, which prohibited the company from discharging its employees without just cause. When the company refused to arbitrate the grievances, the union filed this suit seeking to compel arbitration pursuant to § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a).

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits on file, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). On cross-motions for summary judgment, the court must rule separately on each party's motion by independently determining whether a genuine issue of material fact exists. *SEC v. American Commodity Exchange, Inc.*, 546 F.2d 1361, 1366 (10th Cir. 1976). The filing of cross-motions for summary judgment, however, "raises the inference that there is no evidence other than the pleadings and supporting instruments to be

considered, and so the trial court need only examine those materials in ascertaining whether a material fact exists." *Id.* at 1366.

In *AT&T Technologies v. Communication Workers of America*, 475 U.S. 643 (1986) the Supreme Court articulated the four principles underlying the law of labor arbitration: (1) the duty to arbitrate is contractual so that a party cannot be compelled to arbitrate a dispute unless he has agreed to do so; (2) whether a dispute is arbitrable must be decided by the court, not the arbitrator; (3) the court must not decide the merits of the dispute; and (4) whenever a contract has an arbitration clause, the court must presume the parties intended to arbitrate unless the court determines " 'with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' " 475 U.S. at 648-50 (quoting *Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). *See also Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford, Jr. University*, 109 S.Ct. 1248, 1253-54 (1989) (discussing the strong federal policy favoring arbitration in contracts subject to the Federal Arbitration Act); *Nolde Brothers, Inc. v. Bakery and Confectionery Workers Union*, 430 U.S. 243, 254 (1977) (discussing same policy in collective bargaining agreements containing arbitration clauses).

Although the duty to arbitrate a labor dispute is contractual, this duty is not automatically extinguished upon the expiration of the collective bargaining agreement. *Nolde Brothers*, 430 U.S. at 250-51. In *Nolde Brothers*, the employer went out of business after the collective bargaining agreement between it and the union expired. After the employer rejected the union's demand for severance pay, which was provided by the expired collective bargaining agreement, the union sought to arbitrate the dispute pursuant to the agreement's arbitration clause. The employer argued it had no duty to arbitrate this

issue because the duty expired with the collective bargaining agreement. The Supreme Court disagreed and held that so long as the dispute arose under the collective bargaining agreement, the presumption of arbitrability survived the agreement's termination even though the dispute ripened after the agreement had expired. The court stated as follows:

> The parties must be deemed to have been conscious of this policy when they agreed to resolve their con-contractual differences through arbitration. Consequently, the party's failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication.

430 U.S. at 255. *See also International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Telex Computer Products, Inc.*, 816 F.2d 519, 522 (10th Cir. 1987) (parties are obligated to arbitrate dispute arising after expiration of collective bargaining agreement unless the obligation is negated expressly or by clear implication). *But see Chauffeurs, Teamsters, and Helpers v. C.R.S.T., Inc.*, 795 F.2d 1400, 1405 (8th Cir. 1986) (en banc) (*Nolde* presumption inapplicable to postcontract termination because the right involved, to be discharged for just cause, does not arise under the contract).

The union argues that the court should compel arbitration on the dispute at issue for two principal reasons. First, it argues that the company has a duty to arbitrate because its implementation of its last offer extended the arbitration provision of the expired collective bargaining

agreement. Second, the union argues, assuming there was no extension, that arbitration is required because *Nolde* creates a presumption favoring postcontract arbitration.[1] In response, the company argues that implementation of its final offer neither created a new contract nor extended the old. It also argues there is no presumption favoring postcontract arbitration under *Nolde* because the grievances neither arose under the expired collective bargaining agreement, nor did they arise within a reasonable time after its expiration.

An employer and a union may adopt a collective bargaining agreement without a signed contract by manifesting their intent to abide by and be bound by its terms. *NLRB v. Haberman Construction Company*, 641 F.2d 351, 355-56 (5th Cir. 1981) (en banc). The parties' intention is determined objectively by their "manifested mutual assent." *United Paperworkers International Union v. Wells Badger Industries*, 835 F.2d 701, 703-04 (7th Cir. 1987). In *United Paperworkers International*, the employer circulated two memoranda to its employees assuring them all the provisions of their expired collective bargaining agreement not specifically modified would remain in effect. Because the prior collective bargaining agreement contained an arbitration provision, the court held that the parties intended the "original arbitration provision would extend beyond the expiration date of the contract." 835 F.2d at 704. The court reached the same holding in *Taft Broadcasting Co. v. NLRB*, 441 F.2d 1382, 1383-84 (8th Cir. 1971), where it held that an interim agreement to arbitrate was created by the company sending a letter to the union stating that the

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[1] The union also argues that the court must compel arbitration because the dispute is covered by the arbitration provision of the expired agreement. This argument is relevant, however, only if the court determines that the arbitration provision was extended beyond or survived the expiration date of the collective bargaining agreement.

grievance procedure contained in a draft agreement would be in effect until changed by negotiation.

The defendant attempts to distinguish *United Paperworkers International* from the case before the court by asserting "there is absolutely no evidence that the parties manifested any intention to be contractually bound. . . ." Defendant's brief at 8. The court disagrees. In the case before it, the employer sent a letter to the union on June 4, 1987, stating that "all other provisions of the 1984 labor agreement not hereinbefore mentioned remain in effect under our offer." The letter contained the company's "last and final offer," which did not mention the expired agreement's arbitration provision. The arbitration provision therefore remained in effect at all relevant times. The company's letter and the employee's continuation to work after the offer was made objectively manifest the parties' mutual assent. The court finds that the parties by their acts intended to abide and be bound by the unchanged terms of the expired collective bargaining agreement. Although the company did not circulate a second memorandum or agree to select an arbitrator, as did the employer in *United Paperworkers International*, the court finds these facts do not alter the legal relationship created between the parties on July 1, 1987, the date on which the company implemented its last and final offer.[2] In making this finding, the court is guided by the principles that "a collective bargaining agreement is not an ordinary contract," *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964), and that "[r]easoned flexibility in the application of contract law to the field of labor relations is necessary to fully effectuate the policies underlying federal labor law." *Capitol Hustings Co. v. NLRB*, 671 F.2d 237, 242 (7th Cir. 1982). Because

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[2] These facts were also notably absent in *Taft Broadcasting Co.*, 441 F.2d 1382. Despite their absence, the court found an interim agreement to arbitrate based on the letter the company sent to the union.

the court finds that the parties intended to be bound by the unchanged terms of their expired collective bargaining agreement, it will decline to determine whether the *Nolde* presumption favoring postcontract arbitration applies.

The dispute for arbitration is whether the employer had just cause to discharge 18 of its former striking employees. The collective bargaining agreement between the parties had a broad arbitration provision, providing for arbitrating discharges where the employee believes he was discharged without just cause. Under the Supreme Court's decision in *AT&T Technologies*, the court finds this dispute is plainly covered by the parties' agreement, and will accordingly order that this dispute be submitted to arbitration.

NOW THEREFORE IT IS ORDERED that the defendant's cross-motion for summary judgment be DENIED.

IT IS FURTHER ORDERED that the plaintiff's motion for summary judgment be GRANTED.

IT IS FINALLY ORDERED that the defendant comply with the Article XX arbitration provision by taking to final and binding arbitration the unresolved grievances of its 18 former striking employees.

Dated this 6th day of July, 1989.

By the Court:

/s/ Arthur B. Johnson
United States District Judge

[DENIAL OF PETITION FOR REHEARING]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-8067

INTERNATIONAL UNION
UNITED MINE WORKERS OF AMERICA,
Plaintiff-Appellee,
v.

BIG HORN COAL COMPANY, a Wyoming corporation,
Defendant-Appellant.

ORDER

Filed September 13, 1991

Before HOLLOWAY, Chief Judge, McWILLIAMS, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges, and BRATTON, Senior District Judge.*

This matter comes on for consideration of appellee's suggestion for rehearing en banc, which the court treats as a petition for rehearing and suggestion for rehearing en banc.

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* The Honorable Howard C. Bratton, Senior United States District Judge for the District of New Mexico, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

(2)

No. 91-1016

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

BIG HORN COAL COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION RESTATED

Where, after reaching a bargaining impasse with the union, an employer lawfully and unilaterally implements terms and conditions of employment contained in its final, unaccepted offer, and where the union thereafter conducts a nine-month economic strike, may the union subsequently maintain an action under Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), to enforce as a "contract[ ]" the employer's unilaterally implemented terms and conditions of employment?

STATEMENT REQUIRED BY RULE 29.1

Respondent Big Horn Coal Company, a Wyoming corporation, is a subsidiary of Kiewit Mining Group, Inc., which is a subsidiary of Peter Kiewit Sons', Inc. Peter Kiewit Sons', Inc. has no parent company.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Respondent Big Horn Coal Company (hereinafter referred to as "Big Horn" or "the Company") and Petitioner were parties to a 1984 collective bargaining agreement that by its terms expired on March 23, 1987. By mutual agreement, the parties extended the contract to June 1, 1987 while they continued efforts to negotiate a successor contract. On June 4, 1987, Big Horn reiterated in writing what was, by its terms, its "*last and final offer*" to Petitioner. R.1 (Complaint), Ex. B at 15 (emphasis in original). That offer delineated the contract sections that the Com-

pany proposed to change from the prior agreement and further stated that "all other provisions of the 1984 labor agreement not hereinbefore mentioned remain in effect under our offer." *Id.* Among the provisions not so mentioned were the grievance and arbitration provisions of the expired agreement. App. 2a & n.1.

On July 1, one month after the contract extension had expired and with the parties still unable to agree on the terms of a new contract, Big Horn "unilaterally implemented working terms and conditions contained in its last offer." App. 8a.[1] Further negotiations thereafter continued to prove fruitless, and on October 5, 1987, Petitioner and the Big Horn employees it represents commenced an "economic strike" against Big Horn in an effort to enforce their bargaining demands. App. 8a.[2] This strike continued until June 27, 1988—a total of 267 days, or nearly nine

[1] It is undisputed that as of July 1, 1987, "negotiations [had] reached an impasse." App. 2a. Hence, there is no question concerning the lawfulness of the Company's unilateral implementation of its final offer. *See, e.g., Laborers Health & Welfare Trust Fund v. Advanced Light Weight Concrete Co., Inc.*, 484 U.S. 539, 544 n.5 (1988) ("[A]fter bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the [National Labor Relations] Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.") (quoting *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *aff'd sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (1968)).

[2] "[A]n 'economic strike' is a strike over wages, hours, or terms and conditions of employment." *George Banta Co., Inc. Banta Div. v. NLRB*, 686 F.2d 10, 14 n.5 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). "[E]conomic strikes generally are used in attempting to enforce economic demands upon the employer." 2 *The Developing Labor Law* 1007 (C. Morris 2d ed. 1983).

months. App. 3a.[3] As of late 1989 when the parties' briefs were filed in the Tenth Circuit, Petitioner and the Company *still* had not agreed on a new collective bargaining agreement. App. 5a n.2.

After the strike ended, the Company refused to reinstate 18 of the striking employees because they had engaged in serious strike-related misconduct. Each of the 18 filed a grievance protesting his discharge, R.1 (Complaint) ¶ 12, and "Big Horn agreed to process the grievances." R.17 (Affidavit of UMWA District 15 President Terry Benson) ¶ 6.[4] When Petitioner and the Company were unable to resolve the grievances, Petitioner demanded arbitration. The Company refused to submit to arbitration on the grounds that the grievances were not arbitrable. App. 3a.

Petitioner then brought this action pursuant to Section 301(a) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), seeking an order to compel the Company to arbitrate, on the grounds that the Company's unilateral implementation of its last and final offer extended the Company's contractual obligation to arbitrate. App. 3a. The district court granted Petitioner's motion for summary judgment and denied the Company's motion, holding that "the parties by their acts intended to abide and be

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[3] The court of appeals mistakenly characterized the strike as lasting seven months. App. 5a.

[4] Employers and unions have a statutory duty under the National Labor Relations Act ("NLRA") to confer and seek agreement over employee grievances that arise during the hiatus between the expiration of a collective bargaining agreement and the reaching of a new agreement. *Hilton-Davis Chemical Co.*, 185 N.L.R.B. 241, 242 (1970), *cited in Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215, 2222 (1991). That statutory duty does not extend to arbitrating such grievances. *Id.*, 111 S. Ct. at 2222.

bound by the unchanged terms of the expired collective bargaining agreement." App. 12a.

On appeal, the Tenth Circuit reversed *per curiam*. Citing, *inter alia*, its previous decision in *United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990), the court of appeals stressed that "jurisdiction under Section 301(a) of the Labor-Management Relations Act arises when redress is sought for 'violations of *contracts* between an employer and a labor organization.' " App. 4a (quoting 29 U.S.C. § 185(a) as set forth in *Gold Star*, 897 F.2d at 1026). The court also emphasized that:

> The contract between the parties required for jurisdiction need not be a written, signed collective bargaining agreement but may exist as any informal agreement between the parties significant to the maintenance of labor peace between them. *Retail Clerks Int'l Ass'n, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28 (1962). It suffices that the parties' intent to abide by the agreed-upon provisions of any such informal agreement is in some manner manifest. [Citing cases.]

App. 4a.

Based on the undisputed record, the court of appeals concluded that the district court's determination that a contractual relationship arose between Petitioner and the Company was "unsupported." App. 5a. Noting that "[e]mployer implementation of a last and final offer is, by itself, insufficient to invoke jurisdiction [under Section 301] absent some manifestation of acceptance of the offer sufficient to create a contract," and that "simply spotlighting management's exercise of its statutory right to implement its last and final offer does not establish the contractual basis necessary for jurisdiction," the court held:

> The facts of the present case . . . suggest implicit rejection of the employer's offer. . . . Employee conduct after July 1, 1987, did not evince an acceptance of the Company's last offer. To the contrary, *the commencement of a seven-month strike on October 5, 1987, during which time the alleged misconduct occurred, shows continued dissatisfaction with and rejection of the employer's offer.*

App. 5a (citation and footnote omitted, emphasis added).

REASONS FOR DENYING THE WRIT

This case presents neither the question nor the conflict that the Petition suggests. The Tenth Circuit's holding is a garden-variety application of well established Section 301 principles—many of which this Court reaffirmed last term in *Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215 (1991)—to undisputed record evidence. To say the least, the decision below presents no issues appropriate for review by this Court.

1. In an effort to create a reviewable sow's ear out of a silk purse, Petitioner states the question presented in this case as whether "contractual obligations . . . enforceable under Section 301(a) . . . [may] aris[e] from the course of dealings and conduct of the parties in the absence of a formal collective bargaining agreement." Petition at i. According to Petitioner: "[I]f the rationale of the Tenth Circuit prevails, Section 301 will only be available in those instances where a party can present a formal contract to the court and prevail on the merits. . . ." *Id.* at 5.

Unfortunately, Petitioner seriously mischaracterizes the decision below, which was expressly premised on the as-

sumption that a "formal contract" is *not* a prerequisite for jurisdiction under Section 301(a):

> The contract between the parties required for jurisdiction need not be a written, signed collective bargaining agreement but may exist as any informal agreement between the parties significant to the maintenance of labor peace between them. *Retail Clerks Int'l Ass'n, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28 (1962). It suffices that the parties' intent to abide by the agreed-upon provisions of any such informal agreement is in some manner manifest. *Bobbie Brooks, Inc. v. Int'l Ladies Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987); *see also United Paperworkers Int'l Union v. Wells Badger Industries, Inc.*, 835 F.2d 701, 704 (7th Cir. 1987).

App. 4a. Thus, the entire Petition begs a question that the Tenth Circuit, consistent with the precedents of this Court and other courts, answered in Petitioner's favor. Petitioner simply takes issue with the Tenth Circuit's common sense conclusion, based on the undisputed record, that "[t]he facts of the present case . . . show[ ] [Petitioner's] continued dissatisfaction with and rejection of the employer's offer." App. 5a. Such a case does not warrant this Court's attention.

2. As pertinent here, Section 301(a) states with the utmost clarity:

> Suits for *violation of contracts* between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (emphasis added). Despite this plain language, Petitioner cryptically asserts that review by this

Court is necessary "to establish the inclusive reach of Section 301." Petition at 5-8. Yet the Tenth Circuit's holding that a district court lacks jurisdiction under Section 301(a) in the absence of a "contract" faithfully implements Section 301(a) as consistently interpreted by this Court and the courts of appeals.[5] *See, e.g., Wooddell v. International Bhd. of Electrical Workers*, 60 U.S.L.W. 4024, 4025 (U.S. Dec. 4, 1991) (to vest subject-matter jurisdiction in the district court, "a suit properly brought under § 301 *must* be a suit either for *violation of a contract* between an employer and a labor organization representing employees in an industry affecting commerce or for *violation of a contract* between such labor organizations") (emphasis added); *Litton Financial Printing*, 111 S. Ct. at 2225 ("Section 301 . . . does not provide a federal court jurisdiction where a bargaining agreement has expired. . . ."); *District Two v. Grand Bassa Tankers, Inc.*, 663 F.2d 392, 398 (2d Cir. 1981) ("Of the hundreds of actions invoking federal jurisdiction under the employer-labor organization contract clause of § 301(a) we have not found any case which did not involve *an agreement* relating to the employer's relationship with its own employees.") (emphasis added).[6]

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[5] Petitioner concedes, as it must, that Section 301(a) is jurisdictional. Petition at 5. If Petitioner's argument is that the federal district courts should have jurisdiction to decide the merits of labor-management disputes even after the court determines that no "contract" (either formal or informal) exists between the parties, Petitioner must address that argument to Congress.

[6] *See also Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 23-27 (1962) (discussing at length whether strike settlement agreement was a "contract" sufficient to give rise to jurisdiction under Section 301(a)); *Teamsters Local 249 v. Western Pennsylvania Motor Carriers Ass'n*, 660 F.2d 76, 83 (3d Cir. 1981) ("a

(Footnote continued on following page)

Likewise, the Tenth Circuit's conclusion that, on the undisputed record, "no contract [existed] between the parties upon which to base jurisdiction under Section 301," App. 2a, is completely unremarkable. The Company's unilateral implementation of its last and final offer was nothing more than just that—an exercise of its post-impasse right *unilaterally* to put into effect an offer Petitioner never accepted. *See supra* note 1.[7] On its face and as a long-established matter of law, it did not constitute a promise that the Company would abide by the expired arbitration provisions (or any other provisions of the defunct agreement) in the absence of a mutually binding, mutually agreed-to new contract. *See, e.g., Litton Financial Printing*, 111 S. Ct. at 2225 ("An expired [collective bargaining agreement] . . . is no longer a 'legally enforceable document.' ")

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[6] *continued*

prerequisite for section 301 jurisdiction is a contract between the employer and labor organization").

Enforcement of the jurisdictional prerequisite of a "contract" under Section 301(a) is particularly appropriate where, as here, a party invokes the district court's jurisdiction to enforce an alleged contractual obligation to arbitrate. *Litton Financial Printing*, 111 S. Ct. at 2222 ("[A]rbitration is a matter of consent, and . . . it will not be imposed upon parties beyond the scope of their agreement. . . . If, as the Union urges, parties who favor labor arbitration during the term of a contract also desire it to resolve postexpiration disputes, the parties can consent to that arrangement by explicit agreement."); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("arbitration is a matter of contract").

[7] This post-impasse right of the employer unilaterally to implement its final offer is fundamental to the balance of economic power that the NLRA strikes between labor and management. *NLRB v. Katz*, 369 U.S. 736, 745 (1962); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488-90 (1960); *NLRB v. American National Ins. Co.*, 343 U.S. 395, 404 (1952); *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59, 65 (1964).

(quoting *Office & Professional Employees Ins. Trust Fund v. Laborers Fund Administrative Office of Northern California, Inc.*, 783 F.2d 919, 922 (9th Cir. 1986)); *Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22, 26-27 (2d Cir. 1988) ("Rights and duties under a collective bargaining agreement do not . . . survive the contract's termination at an agreed expiration date."); *Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co.*, 312 F.2d 181, 184 (2d Cir. 1962) ("Where no [contract] extension is negotiated, or where the period of the extension has also expired, there is no ground whatever for considering that the old agreement still governs the relationship of the parties."), *cert. denied*, 374 U.S. 830 (1963).

Indeed, Petitioner has not cited, either in its Petition to this Court or in its brief below, a single case suggesting that the jurisdictional prerequisite of a "*contract*" can be met where, as here, the union goes on strike and the parties remain at impasse following the employer's unilateral implementation of its unaccepted final offer.[8] To the con-

[8] As with its mischaracterization of the question presented for review, Petitioner overreaches in mischaracterizing the case law discussed at pages 8-11 of the Petition as presenting an "unsettled conflict" between the circuits requiring resolution in the instant case. Each of the cases cited by Petitioner involved the issue whether jurisdiction under § 301(a) is limited to suits (such as that in the instant case) brought "for *violation* of contracts," or whether such jurisdiction also extends to suits brought to *challenge or confirm the validity* of contracts. *See, e.g., International Bhd. of Elec. Workers v. Sign-Craft, Inc.*, 864 F.2d 499, 501 (7th Cir. 1988) (holding that jurisdiction exists under § 301 over such suits); *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321, 1323 (9th Cir. 1988) (suit to rescind contract allegedly procured through fraudulent inducement), *cert. denied*, 490 U.S. 1030 (1989). That issue is plainly absent here. Moreover, in each of the cases cited by Petitioner, the court recognized that the existence of a "contract" (even if only one that is allegedly voidable) is a

(Footnote continued on following page)

trary, the consistent case law confirms the Tenth Circuit's conclusion that Petitioner manifested its "continued dissatisfaction with and rejection of the employer's offer." App. 5a. *See, e.g., Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 248 (1970) ("[A] no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit the grievance disputes to the process of arbitration."); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956) ("Like other contracts, [a collective bargaining agreement] must be read as a whole. . . ."); *Bobbie Brooks, Inc. v. International Ladies' Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987) ("A meeting of the minds of the parties must occur before a labor contract is created. . . . As a general rule, a contract does not arise if the union and management have not resolved a dispute over a substantive term."); *United Paperworkers Int'l Union v. Wells Badger Industries, Inc.*, 835 F.2d 701, 703-04 (7th Cir. 1987) ("the intention of the parties [to be bound by a collective bargaining agreement] under most circumstances must be determined on the basis of an objective standard—the parties' manifested mutually assent"); *Globe Seaways, Inc. v. National Marine Eng. Beneficial Ass'n*, 451 F.2d 1159, 1163 (2d Cir. 1971) ("It should not be lightly in-

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[8] *continued*

jurisdictional prerequisite under § 301(a), regardless of the type of relief sought. *See, e.g., Rozay's Transfer*, 850 F.2d at 1326. Thus, even if the academic exercise at pages 8-11 of the Petition discusses a bona fide "conflict," the resolution of any such conflict must await another case.

ferred that a union, at its own choosing, can strike over some matters and arbitrate over others.").[9]

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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January 13, 1992

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[9] *See also Warehousemen's Union Local No. 206 v. Continental Can Co., Inc.*, 821 F.2d 1348, 1350 (9th Cir. 1987) ("Normal rules of offer and acceptance govern in collective bargaining."); *NLRB v. IBEW Local No. 22*, 748 F.2d 348, 350 (8th Cir. 1984) ("the general rules of offer and acceptance" determine the existence of a labor contract); *Capitol-Husting Co., Inc. v. NLRB*, 671 F.2d 237, 242 (7th Cir. 1982) ("the normal rules of offer and acceptance are generally determinative of the existence of a collective bargaining agreement"); *Genesco, Inc. v. Joint Council 13*, 341 F.2d 482, 486 (2d Cir. 1965) (concluding that no labor agreement existed "by applying ordinary principles of contract law").

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No. 91-1016

IN THE

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INTERNATIONAL UNION,
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BIG HORN COAL COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

IN THE

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OCTOBER TERM, 1991

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PETITIONER'S REPLY BRIEF

COMES NOW the International Union, United Mine Workers of America (hereinafter referred to as "Union" or "UMWA") and replies to Respondent Big Horn Coal Company's Brief in Opposition to the Petition for a Writ of Certiorari.

In its Brief in Opposition to the Petition for Certiorari (hereinafter referred to as "Opposition Brief"), Respondent attempts to distract the Court's attention from the genuine issue presented by the Writ: the Tenth Circuit's holding below is a product of a conflict among courts as to the reach of Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), inconsistent with Section 301(a)'s reach as interpreted by this Court. Respondent chooses to argue the merits of questions not presented by this case, namely an employer's

right to unilaterally implement its final collective bargaining offer following impasse in negotiations, and whether an expired collective bargaining agreement is an enforceable contract.[1] Opposition Brief at pp. 2; 8-10. In between Respondent engages in a superficial discussion of Section 301(a) which suffers from the same flawed logic relied upon by the Tenth Circuit below. Opposition Brief at pp. 5-7. Neither the Tenth Circuit in its opinion nor Respondent in its Opposition Brief go further than the language of the Section 301 itself, which simply grants the courts jurisdiction over "suits for violation of contracts." 29 U.S.C. § 185(a). Respondent stops short of addressing the real and significant issue raised by the decision below: whether a case brought under section 301 must present a formal written contract to the court to invoke its jurisdiction.

In its attempt to dismiss the Petition as "beg(ging) a question", however, Respondent is compelled to acknowledge that "a 'formal contract' is not a prerequisite for jurisdiction under Section 301(a)." Opposition Brief at p. 6. In fact, "a collective bargaining agreement is not an ordinary contract", and the technical rules of the common law of contracts do not determine the existence of labor contracts. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964). "Reasoned flexibility in the application of contract law to the field of labor relations

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[1] Respondent, for example, seems to suggest that the Court's decision in *Litton Financial Printing v. NLRB*, 111 S. Ct. 2215 (1991) applies to this case and restricts the exercise of Section 301 jurisdiction. Opposition Brief at p. 7. Inasmuch as it arose under the National Labor Relations Act rather than Section 301, and as nowhere in the Petition does the Union argue that any term of the expired collective bargaining agreement between it and Respondent is enforceable against Respondent, *Litton* is inapposite. Directly on point, on the other hand, is this Court's unanimous 1990 decision in *Groves v. Ring Screw Works, Ferndale Fastener Div.*, 111 S. Ct. 498 (1990) which reaffirmed the "strong presumption" of access to the courts in order to resolve labor-management disputes underlying Section 301. *Id.* at 502-03.

is necessary to fully effectuate the policies underlying federal labor law." *Capitol Hustings Co. v. NLRB*, 671 F.2d 237, 242 (7th Cir. 1982). As shown in the Petition for Certiorari, this "reasoned flexibility" and the role of "judicial inventiveness", *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957), in labor jurisprudence follows directly from the broad conception of Section 301 which *Lincoln Mills* and its progeny represent. The decision below, however, effectively undermines these concepts.

As shown in the Petition for Certiorari, the courts are divided as to whether they should refrain from exercising jurisdiction under Section 301(a) as in this case. *See*, e.g., *Kozera v. Westchester-Fairfield Elec. Contractors*, 909 F.2d 48, 52 (2nd Cir. 1990), *cert. denied*, 111 S. Ct. 956 (1991); *Intern. Bh'd. of Elec. Workers, Local 481 v. Sign-Craft, Inc.*, 864 F.2d 499, 501-502 (7th Cir. 1989); *Mack Trucks, Inc. v. Intern. Union, UAW*, 856 F.2d 579, 586-90 (3rd Cir. 1988), *cert. denied*, 489 U.S. 1054 (1989). The emerging consensus among the courts is that they do have jurisdiction pursuant to Section 301 to hear and decide questions as to the existence or validity of contracts. *See*, e.g., *Kozera*, 909 F.2d at 52 ("to determine whether a breach of agreement has occurred a court must necessarily determine whether a valid agreement exists . . ."); *Mack Trucks*, 856 F.2d at 590 ("§ 301(a) confers jurisdiction on a district court to determine the existence of a collective bargaining agreement"); *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321, 1326 (9th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989) ("Section 301 . . . applies . . . to suits impugning the existence and validity of a labor agreement").

In the *United Food and Commercial Workers Intern. Union v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990), however, the Tenth Circuit rejected the union's argument that the employer "assumed the obligation to arbitrate when it implemented its (last contract) offer," finding that Section 301 "gives the court jurisdic-

tion over suits for violation of *contracts*" only. *Id.* at 1026 (emph. in orig.). Simply observing that because the employer's last offer is not a contract, the Tenth Circuit held that it was without jurisdiction to consider the merits, ignoring any argument that implementation of a contract offer may lead to enforceable contractual obligations. *Ibid.*[2] The Tenth Circuit's decision reversing the District Court herein tracks the language of *Gold Star Sausage* almost verbatim: "we determine that this Court is without jurisdiction to consider whether the disputes in this case should be referred to arbitration" (A. 6a).[3] This holding is in direct conflict with the scope of Section 301 as described in its legislative history, its interpretation by this Court, and the emerging consensus of the courts of appeal. *Kozera*, 909 F.2d at 52; *Mack Trucks*, 856 F.2d at 586-90. If the words of the Tenth Circuit are given effect, no court could exercise jurisdiction over a case seeking to enforce labor contracts other than formal, written agreements, leaving labor-management disputes unresolved and parties to them without further recourse. For that reason the Petition should be granted to resolve the conflict among the courts and vindicate the broad reach of Section 301.

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[2] In so doing the *Gold Star Sausage* panel ignored an earlier Tenth Circuit decision in *McNally Pittsburg, Inc. v. Intern. Ironworkers*, 812 F.2d 615 (10th Cir. 1987), choosing instead to rely on narrower authority explicitly rejected by both *McNally Pittsburg* and by the court which *Gold Star Sausage* purported to be following. *Compare Gold Star Sausage* and *McNally Pittsburg; Sign-Craft, Inc.*, 864 F.2d at 501-02. Other courts, meanwhile, have since adopted the reasoning of *McNally Pittsburg*. *See Kozera*, 909 F.2d at 52; *Mack Trucks*, 856 F.2d at 589.

[3] Reference is to the appendix ("A.") to the Petition for Certiorari and page number ("—a") thereof.

CONCLUSION

WHEREFORE, based on the above and foregoing, Petitioner International Union, United Mine Workers of America, respectfully submits that this case presents the Court with a substantial question of federal law about which the lower courts are in conflict, and that its petition should therefore be granted.

Respectfully submitted,

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